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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 25.

WILLIAM PRESSER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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FOREWORD.

The undersigned was the appellant's trial lawyer in this case. He has been a corporate civil jury trial lawyer for 32 years. He is a Fellow of the American College of Trial Lawyers. He is a member of the Executive Committee of the National Association of Railroad Trial Counsel. He is a former member of the Executive Committee of the Cleveland Bar Association. He is a member of the Judicial Administration Section of the American Bar Association.

As a result of this Court's action, he received the following entry dated November 13, 1962:

> "PER CURIAM. The judgment is affirmed by an equally divided court.
>
> "Mr. Justice Goldberg took no part **in the consideration** or decision of this case." (Emphasis supplied.)

On October 8, 1962 oral argument was had before nine Justices. Mr. Justice Goldberg sat on the Court and participated in questioning of counsel for appellant and appellee. With an equally divided Court, his refusal to vote caused an affirmance of a conviction in a criminal case. If a Juror in every Federal Case exercised such a right, every Federal Jury Trial (Civil or Criminal) would result in a "hung jury."

This case was originally argued on March 21, and 26, 1962 before the Supreme Court with eight Justices sitting. (Justice Whittaker was ill.) On April 2, 1962 this case was restored to the calendar for reargument and placed on the summary calendar. The irrebuttable presumption is that this case was restored to the calendar for reargument because at that time there existed an equally divided court. If this were not true, the case would have been decided upon the arguments presented in March of 1962. After three trips to Washington, and three arguments, we

now stand as though the petition for writ of certiorari had been denied. A 5 to 4 decision—either way—would have resulted in a written opinion for the benefit of the Bench and Bar. This posture would be more consistent with the granting of a writ of certiorari.

The evil of an affirmance in a criminal case by an equally divided Court where nine Justices sat during the argument could only exist in this Country because of a weak Trial Bar.

Justice Clark, of this Court, addressed the American College of Trial Lawyers at Bal Harbour, Florida, on March 13, 1962, **just one week before this case was first argued.** His comments are pertinent to the problem produced by this affirmance:

> * * * "There are two factors necessary to maintain a healthy advocacy. The first is a strong trial bar, and the second is an efficient judicial system. I come here to counsel with you as to the state of both.
>
> "I talk with you because I believe that the genius of our system may be threatened. My case is laid before you because among you are the most successful and knowledgeable advocates in the profession. In addition, you have forged yourselves together into a strong, dynamic, and distinguished national College. It was Edmund Burke who said that 'evil grows because good men do nothing about it.' I have an abiding faith that you are 'good men.' Equally strong within me is the feeling that where evils exist you have the courage to do **something** about them."

To further make his point, Mr. Justice Clark also quotes Dean Drinan before the American Judicature Society:

> * * * "There is nothing more corrosive of conscience and destructive of integrity than the guilty knowledge that we tolerate each day—through fear or

apathy—**conditions which we know should be and could be corrected.**'" (Emphasis supplied.)

With reference to the fact that the Board of Governors of the American Bar Association had created the Joint Committee for the Effective Administration of Justice, Mr Justice Clark concluded as follows:

> "To help in this great undertaking, I extend to the College an invitation to appoint a representative to sit with us on the Joint Committee. Together we can forge a sequel to Edmund Burke's admonition, and it will be: 'Good men **will** do something about the evils of the law.'"

The evil of an affirmance by an equally divided Court in a criminal case where there has been a conviction should not be tolerated by nine sitting Justices. It is an abuse of the judicial process which should be submitted for consideration to the Joint Committee.

In the words of my high school Civics teacher:

"This small voice has now been heard."

EDWIN KNACHEL,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

The Petitioner, William Presser, respectfully prays this Court for its order granting a rehearing of its judgment of November 13, 1962.

REASONS FOR GRANTING REHEARING.

I.

The importance of the question presented by the Petition of William Presser is of such magnitude, not only to the Petitioner but to every citizen of the United States, that it warrants the consideration of the full Court.

The Petitioner has been indicted, tried and convicted for the obstruction of the due and proper exercise of the Committee's power of compulsory process. There is no denial by the Government that the subpoena (the violation of which forms the gravamen of the indictment) was not issued in accordance with the provisions of Senate Resolu-

tion 74 (Gov. Ex. 5-C, 312a) or the Rules of Procedure of the Senate Select Committee (Gov. Ex. 6, 313a).

Even though the Court of Appeals has stated the law to be that there is "**nothing unlawful in the method used by the Committee in issuing the subpoena duces tecum**" (407) the Government has made no claim throughout this litigation that the subpoena was **lawfully issued**. The heart of the Government's position, in this regard, is that a subpoena is not necessary to the maintenance of an action for obstruction of justice under Title 18 U. S. C., Section 1505. Whether a valid subpoena is necessary to the maintenance of such an action may or may not be sound law (it may even be admitted here to be sound law); however, that issue is not at all involved in this case. A consideration of that issue confounds the real issue presented here, and the real and substantial issue is whether any non-compliance with a void process can be violation of any law particularly of Title 18 U. S. C., Section 1505.

If non-compliance (assuming non-compliance) with a void process can support the Petitioner's conviction, then the Petitioner is to be deprived of his protection under the Fifth Amendment to the Constitution. Neither the Petitioner nor any other citizen should be required to choose between compliance with a void process and imprisonment.

To require the Committee to exercise the delegated power of the Senate in the manner prescribed by Senate Resolution 74 and the Committee's own Rules of Procedure places no sanctions upon the Committee whatso-

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[1] Br. of United States, On Writ of Certiorari, p. 27.
Br. of United States, On Petition for Writ of Certiorari, p. 15.
Brief of Plaintiff-Appellee (C. A. 6th) pp. 7, 24.

ever,* but such a requirement would, in part, certainly insure due process to the people. *Watkins v. United States*, 354 U.S. 178 (1957).

The full power of the United States Senate has been visited upon the Petitioner to the extent that the Petitioner is to be deprived of eight months of his life; not through any lawful act of the Senate or its legally constituted authority, but through the over-zealous and officious act of a Committee investigator. To deprive the Petitioner of eight months of his life the Committee is not to be held to the proscriptions of Senate Resolution 74 or its own Rules of Procedure, however the Petitioner is to be held to the proscription of Section 1505 as that statute pertains to circumstances which are neither laid, nor presented by, the indictment against him.

The principle that demands that those procedures which curtail or adjust the freedom of every citizen with the requirements of the Government must be such a principle that it transcends the lack of perspicuity, or the artless presentation of counsel or the personalities of the parties involved, if we are to survive as citizens of a free nation.

Every man who recognizes that our freedoms are a bequest or is remotely aware of the manner in which they were obtained to bequeath, must surely feel that now is the propitious time for this Court to express itself as the sole guardian of our heritage.

Today's investigator, armed with a void process, is tomorrow's dictator. To allow an employee of a Senate

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* The 5th Amendment Today, Erwin N. Griswold, pp. 31-52, p. 49.

Braden v. U. S., 365 U. S. 431 (1961) *Dissent.*

Investigating Committee to determine, arbitrarily, the fate of our citizens is the reincarnation of the general warrants which were supplied to the officers of the Crown through Writs of Assistance.

The spirit of the flickering beacon that was ignited on the night of April 18, 1775 had smoldered in the hearts of such men as James Otis for more than a decade before, and few things breathed life into that flame as did the impassioned arguments of Otis against the overbearing, arbitrary power of the general warrants issued through the Crown.[1] Nothing insured the birth of this nation more than the English Crown's insistence upon its right to obtain Writs of Assistance as the odious engines of enforcement of its revenue laws.[2] Nothing has insured the eminence of this Nation more than our insistence upon the cherished freedom from the arbitrary and capricious exercise of the powers of the State against its citizens. Nothing can more surely or quickly squander our birthright than a toleration of the arbitrary exercise of the power of government over its citizens.[3]

Whether or not the Colonial insistence upon the abolition of Writs of Assistance was in fact the cornerstone upon which the United States has been built, certainly our present insistence upon the abolition of the general warrants of the illegal or unauthorized subpoena is the keystone to the arch that has led us from the tyranny of arbitrary power of the state to the freedom afforded by our constitution.

Should the Court afford this question less than its full consideration, it is most respectfully submitted that eight

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[1] The Works of John Adams, Vol. X, p. 276.

[2] Quincy's Mass. Reports 452-4.

[3] *Jones v. Securities and Exchange Commission*, 298 U. S. 1 (1935) *Dissent*.

months of the petitioner's life will be a sullen epitaph to Lexington.

II.

On July 1, 1960 the Petitioner filed his notice of appeal in the United States Court of Appeals, Sixth Circuit, appealing from the judgment entered by the District Court on the verdict of the jury.

On November 13, 1960 Brief of Appellee was filed with the Court of Appeals. Petitioner's Brief was supported by the transcript of the Record of the trial filed with the Clerk of the District Court on July 1, 1960, the exhibits of the parties that are now a part of the Record here (308a-323a) and the original papers certified to the Court of Appeals by the District Court on September 2, 1960. The Petitioner's designated Record on appeal included all of the transcript of the Record at the trial except the character witnesses of the Petitioner and those exhibits of the parties admitted into evidence at the trial and referred to above.

On or about November 21, 1960, the Government's attorneys, without notice to Petitioner's attorneys, recourse to the District Court or compliance with the Rule 36 of the Federal Rules of Criminal Procedure or Rule 75 of the Federal Rules of Civil Procedure, obtained the Certificate of the Court Reporter to the effect that the transcript of the Record filed on July 1, 1960 contained an error in transcription (385, 386).

On December 14, 1960, the Government's attorneys obtained a transcript of the pretrial discussions had in chambers of the trial court on May 18, 1960. This transcript was filed in the Court of Appeals as "additional supplemental certified record" (352-358).

The Petitioner then filed his motion in the District Court to strike the Certificate of the Court Reporter on the ground that if any error in transcription did exist, the Government must proceed in accordance with Criminal Rule 36 or Civil Rule 75. *Butler v. United States*, 188 F. 2d 24 (D. C. Cir. 1951); *Carter v. United States*, 168 F. 2d 310 (10th Cir. 1948). Combined with the foregoing motion, the Petitioner also sought to strike the transcript of the pretrial discussions on the ground that such discussions were not a part of the Record against the Petitioner in this case and in any event the presence of a reporter was for the Court's convenience.

On January 6, 1961, the trial court overruled both motions of the Petitioner on the ground that the Court of Appeals had exclusive jurisdiction over the Record on appeal under Rule 39 of the Federal Rules of Criminal Procedure.

On January 9, 1961, Brief of Plaintiff-Appellee, together with an Appendix was filed in the Court of Appeals. The Appendix of the Government contained (1) the certificate of the District Court Reporter stating that the original transcript of the Record was erroneously recorded (385); (2) the transcript of the pretrial discussions (352); (3) portions of the hearing before the Select Committee which were not admitted into evidence; and (4) portions of the Interim Report of the Committee also which were not admitted into evidence (388).

On February 7, 1961 the Petitioner filed his motion with the Court of Appeals praying for an order to strike: First, the Certificate of the Court Reporter on the grounds that the Government had not complied with Criminal

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The portions of the Hearings before the Select Committee which were included as a part of Appellee's Appendix in the Court of Appeals have been eliminated as a part of the Record in this Court.

Rule 36 or Civil Rule 75; second, the transcript of the pretrial discussions on the ground that the pretrial was not a part of the Record against the Petitioner; and finally, the portions of the Committee Hearin; and the Interim Report on the ground that neither had been considered at any hearing in this case and were not a part of the evidence in the Record against the Petitioner.

On February 24, 1961 the Court of Appeals overruled the Petitioner's motion to strike the transcript of the pretrial discussions and reserved its ruling on the motion to strike the Certificate of the Court Reporter and the excerpts from the Committee Hearing and Interim Report until the argument on the merits of the case.

On March 4, 1961 the Petitioner filed its motion for leave to file a Supplemental Brief in the Court of Appeals on the ground that if the pretrial discussions were a part of the Record against the Petitioner a new trial was in order for the Petitioner under Criminal Rule 43 because at the time that the discussions were had the Petitioner was not present. The Court of Appeals granted the Petitioner leave to file his Supplemental Brief and granted five minutes additional time for argument of the reserved questions.

On July 6, 1961 following arguments on the merits of the questions presented by the Brief of Appellant only, the Court of Appeals affirmed the judgment of the District Court without disposing of the question reserved for ruling by its order of February 24, 1961.

The Petitioner does not now attempt to resurrect any question he might have presented to this Court concerning the failure of the Government to comply with Criminal Rule 36 or Civil Rule 75 or of inserting extraneous matters in the Record which were not part of the evidence in the case. The foregoing narration is set out only to show that

although the Government has not turned "square corners" in what appears as an over-zealous effort to secure a conviction, the Petitioner has attempted to present to this Court for its consideration only those questions which are of vital concern to every citizen of the Nation.

Whether a void process can support an indictment and subsequent conviction under Title 18 U. S. C., Section 1505 is such a question of vital concern.

It is, therefore, most respectfully submitted that this question merits the consideration of the full Court.

CONCLUSION.

For the reasons set forth above, Petitioner respectfully prays the Court for its order granting a rehearing.

Respectfully submitted,

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MARSHMAN, HORNBECK, HOLLINGTON,
STEADMAN & MCLAUGHLIN,

Of Counsel.

CERTIFICATE OF COUNSEL.

We, counsel for the Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

EDWIN KNACHEL,

JOHN G. CARDINAL.